Supreme Court, U. S.
FILED
JUL 22 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1258

PETER TERRITO, et al.,
Appellants

versus

CURTIS POCHE, JR., et al.,
Appellees

ON APPEAL FROM THE SUPREME COURT
STATE OF LOUISIANA

MOTION FOR LEAVE TO FILE SUPPLEMENTAL JURISDICTIONAL STATEMENT and SUPPLEMENTAL STATEMENT

DONALD A. HAMMETT
HAMMETT, LEAKE, HAMMETT
HULSE AND NELSON
4600 One Shell Square
New Orleans, Louisiana 70139
Telephone: 581-2121

Attorneys for Appellants

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76 - 1258

PETER TERRITO, et al.,
Appellants

versus

CURTIS POCHE, JR., et al.,
Appellees

ON APPEAL FROM THE SUPREME COURT
STATE OF LOUISIANA

MOTION FOR LEAVE TO FILE SUPPLEMENTAL JURISDICTIONAL STATEMENT and SUPPLEMENTAL STATEMENT

TO: THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES.

Appellants respectfully move this Court for permission to supplement their jurisdictional statement with the rationale of *Northeast Marine Terminal Co., Inc. vs. Caputo, et al.*, No. 76-444, decided June 17, 1977 and to outline the practical implications to employers and employees in approximately one half of the States if the opinion of the Supreme Court of Louisiana is permitted to become the law

governing state - federal compensation and third party liability schemes.

Respectfully submitted,

DONALD A. HAMMETT,
HAMMETT, LEAKE, HAMMETT,
HULSE and NELSON
ATTORNEY FOR APPELLANT
4600 One Shell Square
New Orleans, Louisiana 70139

MAY IT PLEASE THE COURT:

In response to the Court's invitation, the Solicitor General filed a memorandum opposing the granting of an appeal in this matter although he concedes that the preemption claim falls within the appellate jurisdiction of the Court (Memorandum, P. 4 Fn. 5) and further concedes that the issues raised by this appeal/application for writ of certiorari are important to approximately one-half of the sovereign States. (P. 10.) The Solicitor also attempted to brief the merits of the case; however the Solicitor failed to consider the practical effects of the rationale espoused by the Louisiana Supreme Court and the effect upon the Longshoremen's Act if the Louisiana opinion is to govern the state-federal, employee-employer relationships on the waterfront.

I. *The Federal Questions Are Substantial*

The Federal questions involved in this appeal concern the effect of a State remedy upon a Federal statute, the interpretation of the 1972 amendments to the Longshore Act and most significantly, the abrogation of clear and unambiguous provisions of the Federal statute with regard to third party tort liability.

The Louisiana Court's decision and rationale would result in the following:

a) An employee, by the election of a state court remedy, will be able to negate the effect of positive law (Section 33 (i)) specifically immunizing fellow employees from tort exposure;

b) The employee will be deprived of the protection and immunity of the Federal statute;

c) The employer may find itself responding in damages for the tortious actions of its employees, a result specifically repudiated by Congress in 1972.

d) The employer may easily find itself, once again, involved in *Ryan* type situations. For example the Longshoreman's Act presently prohibits *Ryan* type indemnity agreements. Louisiana law contains no such prohibition. Under the *Poche* opinion below, a plaintiff, covered by the Longshore Act but injured on land by the actions of a third party who had exacted an indemnity agreement from the employer, will recover in tort from his employer, the very result corrected by Congress in the 1972 amendments. Under the *Poche* opinion, the land based Longshore plaintiff may neutralize the provisions and immunities granted the employer by a simple choice. No such choice might be available to the employee injured upon navigable waters. Can it be seriously contended that Congress intended such "circular liability" situations, situations sought to be remedied by the 1972 amendment? Can it be seriously argued that Congress intended that remedies be available depending upon which side of the water the injury occurred? The Solicitor failed to take into sufficient account the fact that the Congress, by extension of its maritime jurisdiction, *Jacksonville Shipyards, Inc. vs. Perdue*, 539 F. 2d 533 (5th Cir. 1976), cert denied, encompassed a certain class of employees as Longshore employees. When the Congressional Committee reports are read it becomes clear that Congress was not aware that under pre-1972 jurisprudence certain "twilight zone" employees were able to choose their first party remedies. Both Committee Reports state:

> Coverage on the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs. The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered for party of their activity.

The Committees further stated:

> It is apparent that if Federal benefit structure embodied in [the] Committee bill is enacted, there would be a substantial disparity in benefits. . . . *if State laws are permitted to apply to injuries occurring on land.* S. Rep. at 12-13; H.R. Rpt. at 10-11.

Can it be argued that Congress intended to put all employees clearly covered by the Longshore Act under the old "twilight zone"? Contrary to the suggestion in the Solicitor's memo, there is no mention of the *Hahn* decision or, for that matter any of this Court's "twilight zone" decision involving the choice of a first party remedy. All through both Committee Reports are found the words "uniform", "compensation as exclusive remedy" (except as provided by the Act), and the Reports contain extensive discussions concerning the all encompassing nature of the remedies provided by the Act. The *Poche* decision not only creates a new "twilight zone" for a first party compensation situation but also creates a "twilight zone" in the third party liability area, a result certainly not intended by the Congress.

The *McCartin* case cited by the Solicitor (and all cases cited in the memorandum) involve only first party liability and all involve "twilight zone" employees. Even if the Court should adopt the "concurrent jurisdiction" theory set out by the Louisiana court, the Court should still examine carefully the effect of the *Poche* opinion upon the operation of the Federal enactment. Curtis Poche was *not* a twilight zone employee; however, notwithstanding his status with respect to his (or his heirs') first party claim, this Court should not permit the creation of a new "twilight zone" vis a vis third party liability claims, the result that follows from the *Poche* opinion below.

e) The *Poche* opinion establishes an area of concurrent jurisdiction in which, according to the Louisiana court, both federal and state schemes apply. May the employer choose to handle the claim under the state system and thereby ignore the extensive administrative procedures made a part of the Act by the 1972 amendments? Will the determination of available remedies depend upon an "election" as indicated in *Poche* below? If so, what constitutes the election? All of these questions have a substantial impact upon the application of the Act and all remain either unanswered or answered insufficiently by the courts below.

The Solicitor argues that the federal statute leaves room for supplemental state remedies. (Memo, P. 9.) However the state remedy herein *conflicts* with the statute and the clear intent of Congress. This Court has held that even when Congress has not expressly prohibited dual regulation nor unequivocally declared its exclusionary exercise of

authority over a particular subject matter, federal preemption may be implied. *Bethelehem Steel Co. vs New York State Labor Relations Board*, 330 U.S. 767 (1947), *Northern States Power Company vs State of Minnesota*, 447 F.2d 1143, 1146, (1971). This is especially true when the federal statutes and state remedy are so clearly inapposite. In this case, all agree that the state tort remedy is hostile to the federal legislation. The intended uniformity in the operation of the federal law would be destroyed if varied interpretations are given to the application of state remedies and the federal Act by the sovereign States. The decision of the highest Louisiana court effectively destroys the operation of the immunity granted by Section 33(i) of the Act and the decision below sets forth substantial federal questions that must be resolved. Both Avondale and appellants are burdened with additional liabilities, liabilities abrogated by the Longshoremen's Act as amended.

II. *The Poche Opinion Relies Upon An "Election Theory"*

The opinion below turns upon an "election" of remedies theory. Appellants suggest that a plaintiff should not be able to nullify the operation of a federal statutory immunity by his election, especially when third parties are exposed under a state tort remedy. For this reason, this Court should examine the ramifications of that holding.

III. *The Issues of Preemption and Conflict Between the State- Federal Schemes Require Plenary Consideration.*

The Court's jurisprudence in the area of preemption and federal-state conflict requires detailed and careful analysis of the purposes behind the conflicting statutes or remedies.

Such consideration involves an extensive briefing of the issues and the decision must provide guidance to shipyards and waterfront employers throughout the nation. The opinion below has led to much confusion in Louisiana with respect to the operation of the Federal and State compensation remedies.

IV. *Recent Decisions*

The Court's opinion in *Northeast Marine Terminal Co. Inc., et al v. Caputo*, cited *supra* adds credence to appellants' contention that the Act should be interpreted as written. However this court has never passed upon this state-federal issue. The closest fact situation has been encountered in the offshore fixed platform cases wherein the Outer Continental Shelf Land Act, 43 U.S.C. §1331 et seq. provides that the Longshoremen's Act applies to injuries occurring on fixed platforms offshore to the Louisiana coast. *Rodrigue v. Aetna Cas. and Sur Co.*, 395 U.S. 352 (1969) held that such platforms are islands of Federal law but that the law of the adjacent state shall apply in the *absence of a Federal statute. Nations vs. Morris*, 483 F.2d 577 (5 Cir. 1973) held that a Louisiana law permitting suits by and against fellow employees did not apply as surrogate law and that the grant of immunity found in LHWCA precluded the executive officer suit. The Fifth Circuit refused to find a twilight zone where none existed and, indeed, found a conflict between federal and state law so as to preclude the maintenance of the state remedy. Additionally the Fifth Circuit had affirmed a dismissal of a fellow employees suit in *Hughes vs Chitty*, 415 F.2d 1150, affirming 283 F. Supp. 734 (E. D.La.1969).

The Solicitor completely ignores *Pennsylvania R. Co. vs*

vs O'Rourke, 334 US 334 (1953), in which the Court held that the language of the pre-1972 amendments provided the plaintiff railroad brakeman with the Longshore Act as his exclusive remedy because he fell within the coverage of the Act. This might very well be dispositive of the entire concurrent jurisdiction theory.

Interestingly, the theory of concurrent jurisdiction is a concept proposed by Dean Larson in 3 Larson, *Workmen's Compensation*, a theory proposed prior to the adoption of the Longshore amendments in 1972. Although the application of the concept of concurrent jurisdiction to a clearly covered employee is subject to doubt post-1972, it will be assumed for purposes of argument that it still possesses some vitality. A careful scrutiny of Larson's theory reveals that the basis for this idea is *Bethlehem Steel vs Moores*, 335 US 874 (1948), *Baskin vs Industrial Acc. Commn.*, 338 US 854 (1949) and *Richard vs Lake Charles Stevedores*, 95 So. 2d 830 (La. App. 1957). But *Richard* was specifically overruled and *rejected in Ellis vs Travelers Ins. Co.*, 129 So. 2d 729 (La. 1961), by the Fifth Circuit in *Flowers vs Travelers Ins. Co.*, 258 F. 2d 220 (5 Cir. 1958), cert denied and by courts of other jurisdictions. *Gaddies vs Trenton Marine Terminal, Inc.*, 206 A 2d 180 (S. Ct. App. Div. 1965), *Warner vs Travelers Ins. Co.*, 332 S.W. 2d 789 (Tex. Civ. App. 1960). See also: *Mackey vs Standard Stevedoring Co.*, 131 So. 2d 123 (La. App. 1964), *Robinson vs Lykes Bros. S.S. Co.*, 170 So. 2d 243 (La. App. 1964), *Noah vs Liberty Mutual Ins. Co.*, 267 F.2d 218 (5 Cir. 1959) and *Thibodeaux vs J. Ray McDermott & Co.*, 276 F. 2d 42 (5 Cir. 1960). But significantly, in the *Moore* and *Baskin* cases, the Court affirmed per curiam and rendered no opinions. The Court denied certiorari in *Flowers*, cited above, 359 US 956 (1962). Yet more significantly, each

and every case cited by Larson in support of the theory of concurrent jurisdiction involved a "twilight zone" plaintiff. In affirming *Moore*, the Court cited Davis, the "twilight zone" case.

It is clear that the concurrent jurisdiction theory stands on shaky foundation after the 1972 amendments to the Longshore Act. The removal of the employee herein from the twilight zone removes him from the concurrent jurisdiction if the latter remains viable at all. Therefore this Court should reject such a contention.

Finally, the proponents of the concurrent theory in the Federal-state compensation area concern themselves with a new "twilight zone" of uncertainty because, they state, injured workers will have to guess if they are covered by the Longshore Act. But the developments post - 1972 fail to support the concern. First, the Benefits Review Board (established by the 1972 amendments) has construed the coverage of the Act to shoreside employees very liberally and an outer limit to the "adjoining area" test has not been reached. See: *Avvento vs Hellenic Lines*, 1 BRBS 174 (1974). Second, the Deputy Commissioner has required Avondale Shipyards (a self - insured corporation) to provide not only Longshore coverage for all its employees, but to convert all its state compensation cases to Longshore. Record p. 138. Additionally, the U.S. Department of Labor indicated that the Federal law should prevail and that all Avondale Personnel (excluding clerical help) must be included under Longshore. Record at p. 138. The ambiguity which concerns Gilmore & Black and Dean Larson will not come to pass if the courts properly interpret the new Act. Larson himself relates:

> A good argument can be made that if we had the whole job to do over again in proper historical sequence, this might well be the pattern that would emerge. That is, if the Longshoremen's Act had been passed immediately after *Jensen*, there would have been no need to apply and develop the maritime-but-local exception in this context, and no need to write the absence- of-state-power requirement into the act; in short, the act's coverage could have *been made clearly exclusive as to all injuries on navigable waters, and we would have been spared the whole tortured story.* [45 S. Cal. L. Rev. 699, 736 (1972).]

Congress has done that and more - it included a new class of employment into the "maritime employment" definition. The creation of new twilight zones will begin a new tortured story. The Benefits Review Board in *Avvento:*

> Congress thus extended shoreward the reach of the maritime law to the point that it is now intended to cover shore-side injuries *previously covered by state law.* [*Avvento vs Hellenic Lines*, 1 BRBS 174 (1974)].

Deputy Commissioner R. J. Shea, Seventh Compensation District:

> With regard to shipyards, we take the position that every activity in the shipyard that contributes in any way to building, repairing, or breaking a vessel is covered except in the administrative or clerical area.

> Because of the nature of remedial or social legislation the coverage aspect must be given the broadest possible interpretation. The intent of P.L. 92-576 was to extend jurisdiction and not restrict it; to prevent iniquities and not to create them. [Communication from D. Com. Shea, March 19, 1974].

Finally the Solicitor of Labor has stated in a brief filed in a case involving only state versus federal compensation remedies that:

> ..to whatever extent a State law might be necessarily *inconsistent* with the amended Longshoremen's Act, the Constitutional *Supremacy* of the Federal Act would render the State law void even as to matters therefore subject only to the State law. . ., *Bethlehem Steel Corp. vs Davis*, No. 7662, Texas Court of Civil Appeals, citing *Askew vs American Waterways Operators, Inc.*, 411 U.S. 325 (1973).

The prohibition against executive offer suits is clearly in conflict with the Federal act, and, in the covered employee situation, an action based upon the Louisiana executive officer remedy must fall.

In closing, this court must not allow the Louisiana courts to create a new twilight zone but should interpret the Longshore Act as amended along the guidelines set forth above. The congress and the administrators of the Act have indicated the course to be followed to prevent repetition of the pre - 1972 jurisprudence. Common sense also dictates

that the continued application of a conflicting state tort remedy over the Longshore covered employee would bring back the uncertainties of coverage and judicial revision of the Act - the identical situations that resulted in the amendments of 1972.

Appellants suggest that for the foregoing supplemental reasons, probable jurisdiction should be noted or that a writ issue. The issues posed in this case require a fresh approach.

Respectfully submitted,

DONALD A. HAMMETT
HAMMETT, LEAKE, HAMMETT,
HULSE AND NELSON
ATTORNEY FOR APPELLANTS
4600 One Shell Square
New Orleans, Louisiana 70139
Telephone: 581-2121

CERTIFICATE OF SERVICE

I certify that three copies of the Jurisdictional Statement was served on Charles Kronlage, 717 St. Charles Ave., New Orleans, 70130 and Mr. Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530 by depositing same in the United States mail box, first class postage prepaid, addressed to counsel of record at their post office addresses.

July 21st, 1977.

DONALD A. HAMMETT